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IN THE

Supreme Court of the United States

October Term, 1964

No. 1011

BERNARD HOWARD,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Jurisdictional Statement with Reference to Opinions Below

To the Supreme Court of the United States:

BERNARD HOWARD, the petitioner herein, prays that a writ of certiorari issue to review the judgment of affirmance of the United States Court of Appeals for the Second Circuit, dated and entered the 17th day of February, 1964. The opinion rendered by said Court of Appeals has not yet officially been reported, F. 2d . However, the slip opinion is annexed hereto as the appendix.

The aforementioned judgment unanimously affirmed a judgment of conviction of the United States District Court for the Southern District of New York, dated and entered

on the 24th day of June, 1963,[1] which judgment based upon the decision of the Trial Judge, the Hon. Edmund L. Palmieri sitting without a Jury, a Jury having been waived, adjudged the petitioner, Bernard Howard, guilty under Count 1 of the indictment charging conspiracy to violate Title 15, U.S.C. Sec. 77(e)(a), 77(e)(c), 77(q)(a) and 77x of the United States Code. Under the terms of the aforementioned judgment of conviction, the petitioner was sentenced to a term of imprisonment for a year and a day (R. 3166, 118a).[2] No opinion was rendered in the District Court.

No petition for rehearing has been made to the United States Court of Appeals for the Second Circuit.

The petitioner has made application for an extension of time within which to petition for certiorari and by order of Mr. Justice Harlan, dated March 9th, 1964, the petitioner's time to petition for a writ of certiorari has been extended up to and including the 17th day of April, 1964.

Jurisdiction is conferred on the Supreme Court of the United States to review the aforementioned judgment of

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[1] Judgments of conviction against Martin Benjamin and Milton S. Mende, co-defendants tried with petitioner in the Court below, were likewise affirmed. Morris Reis, another co-defendant, withdrew his appeal and Mitchell Kovaleski, another co-defendant, was acquitted after trial.

[2] Numerals in parenthesis followed by the letter "a" and without a prefix refer to page numbers of the typewritten appendix of the petitioner, Howard, in the United States Court of Appeals for the Second Circuit. Permission had been given to said petitioner in the United States Court of Appeals to proceed upon typewritten brief and typewritten appendix.

Numerals in parenthesis, preceded by letter "G" refer to page numbers of the Government's appendix in the Court of Appeals.

Numerals in parenthesis preceded by letter "R" refer to page numbers of the record on appeal in the United States Court of Appeals.

the United States Court of Appeals for the Second Circuit by writ of certiorari under Title 28, U.S.C. Sec. 1254(1).

Questions Presented for Review

1. Whether negligence by petitioner, a Certified Public Accountant, in preparing pro forma reports concerning the status of American Equities Corporation is a substitute for culpable state of mind so as to warrant a conviction for conspiracy to violate Title 15, Sec. 77x of the United States Code?

2. Whether the evidence concerning petitioner, Bernard Howard, with regard to his negligently preparing the aforementioned pro forma reports concerning the status of American Equities Corporation was of such a nature as to constitute a wilful violation as defined in Title 15, Sec. 77x of the United States Code?

3. Whether the Trial Court committed reversible error in admitting into evidence, over objection testimony by the witness, Drattell, as to alleged telephone conversations between himself and a voice, which Drattell claimed to be that of the petitioner, Bernard Howard, where no basis was established on the trial for Drattell's recognition of the petitioner's voice?

Statutes in Point

TITLE 15, UNITED STATES CODE, SEC. 77e:

Prohibitions relating to interstate commerce and the mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

(c) It shall be unlawful for any person, directly or indirectly to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

TITLE 15, UNITED STATES CODE, SECTION 77q(a):

Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in

order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

TITLE 15, UNITED STATES CODE, SECTION 77x:

Penalties.

Any person who wilfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall, upon conviction be fined not more than $5000 or imprisoned not more than five years or both.

TITLE 18, UNITED STATES CODE, SECTION 2:

Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

TITLE 18, UNITED STATES CODE, SECTION 371:

Conspiracy to Commit Offenses or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such

persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Concise Statement of the Case

The Evidence

The sole count pending against the petitioner, Bernard Howard, was Count 1 of the indictment which charges a conspiracy to violate Sections 77e, 77q, and 77x of Title 15 of the United States Code. Evidence was produced at the trial showing that in December, 1960 the defendant Mende became interested in acquiring an old corporation formed prior to the enactment of the Securities Act of 1933 (R. 711, G. 28a); that he contacted a Reno, Nevada attorney named McDonald to acquire the Star Midas Mining Co., Inc., a dormant corporation incorporated in Nevada in 1919 (R. 811, G. 29a) which was reinstated to do business under the new name of American Equities Corp. with an increased capitalization and new certificates which were issued about December 20, 1960 (R. 822-826, G. 33a-35a); that prior to the transfer of ownership of the corporation to Mende and his associates on February 23, 1961 (R. 833-835, G. 38a-39a) and in December, 1960 Mende and the defendant, Benjamin, discussed the stock of American Equities Corp. with the alleged co-conspirator, Robert M. Green, Vice President of Pledger & Co., a California brokerage firm and Green shortly thereafter entered bids and asked quotes for American Equities stock in the white and pink sheets of the National Quotation Service (R. 1111-1115, G. 54a-56a) and purchased directly from Mende 2500 shares of American Equities stock at 5⅛ (R. 1131, G. 61a); that at about that time Benjamin met the alleged co-con-

spirator, Robert Drattell, a principal of Lawrence Securities, Inc., a New York broker-dealer firm that they discussed American Equities Corp. and Benjamin showed Drattell a list of properties allegedly belonging to American Equities Corp. (R. 85-91); that on January 21, 1961 there was a meeting at the Park Sheraton Hotel in New York where Benjamin introduced Drattell to Mende, also present was the alleged co-conspirator, Morris Reiter a broker, and two other brokers (R. 112-123), and that the alleged assets of American Equities Corp. were discussed; that about January 23, 1961 Benjamin who had been described as the attorney for American Equities Corp. gave Drattell an opinion letter, Gov't. Ex. 5, stating that the stock of American Equities Corp. was free and tradeable under the Securities Act of 1933 (R. 130-314); that during January, 1961 Reiter and Drattell induced other brokers to ask quotes and to bid for American Equities stock (R. 1504, G. 87a); that in late January, 1961, Reiter, Benjamin and G. Everett Parks, a broker also named as a co-conspirator, flew to California and met with Mende, and defendants Mitchell Kovaleski,[3] Morris Reiss and alleged co-conspirators Samuel Green and Paul Reicher, where they discussed American Equities stock (R. 1128-1132, G. 59a-61a) and where Mende gave various amounts of said stock to Parks and Reiter and sent some to Drattell (R. 1495, G. 84a-85a); that Parks and Reiter brought back to New York with them copies of a November 30, 1960 financial statement of American Equities Corp., Gov't. Ex. 1, (R. 145-146, G. 7a-8a) which represented its assets as worth over seven million dollars and a balance sheet to

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[3] The defendant Mitchell Kovaleski was acquitted by the Trial Court.

the same effect prepared by the defendant, Reiss (R. 2172, G. 112a); that based upon the aforementioned exhibits which did not set forth a correct statement of the net worth of American Equities Corp., the petitioner, Bernard Howard, a Certified Public Accountant for about fifteen years (R. 1414, 35a) prepared pro forma reports one for the period ended December 31, 1960 (Gov't. Ex. 13) and the other for the period ended January 31, 1961 (Howard's Ex. H) and that he never verified the existence of said reported assets other than by making inquiries to the defendants Mende and Benjamin (R. 1441-1464, 47a-58a). The petitioner, Bernard Howard, was Benjamin's personal accountant (R. 1415, 36a) and was introduced into the American Equities situation toward the end of January, 1961 by Benjamin, who introduced him to Mende, a client of Benjamin's from California, and they asked him to prepare a consolidated return of the assets of their corporation based on a work sheet and documents that they produced (R. 1441-1444, 47a-49a); that Howard prepared the pro forma consolidated statement as of December 31, 1960 (R. 1420, 38a) and delivered two copies of it to Mende (R. 1464, 58a); that Howard never knew that Mende and Benjamin intended to use that statement in connection with the sale of stock (R. 1469, 61a); that on February 26, 1961 the petitioner, Howard, travelled to California where he stayed with Benjamin and Mende, met the defendant, Kovaleski, who showed him a copy of the Verdi Development Corp. statement dated August 31, 1958 (R. 2185-2196, G. 115a-119a), inspected the records of J. S. Lane & Co. and California Molded Products, Inc. and Howard then prepared his second pro forma statement of American Equities Corp. as of January 31, 1961 (R. 2195-2216, G. 117a-122a) which report was based upon the prior

report and Howard did not personally verify the sources and assets. For all of his efforts the petitioner, Howard, was paid $100.00 during February, 1961 for the preparation of the first statement with promise that a balance of $150.00 would be paid later, this sum was never paid (R. 1655-1658, 75a); that while in California Howard's services at the Beverly Hilton Hotel were discontinued for non-payment although Mende was supposed to pay for Howard's stay and that Howard had to pay both his fare and Benjamin's air fare home from California (R. 1665, 77a). There was testimony to the effect that Howard was present on February 11, 1961 when Mende gave one of the pro forma statements to the co-conspirator, Reiter (R. 1500, 77a) and discussed Plametron Corp. with Maurie Frankl (R. 1013, 26a) and that the co-conspirator Drattell on or about February 10, 1961 discussed one of the pro forma balance sheets over the phone with a voice that claimed it was the petitioner, Bernard Howard (R. 686-687, 19a).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

POINT I

No wilfulness or culpable state of mind was proven with regard to the petitioner, Bernard Howard, to warrant a conviction for conspiracy to violate the Securities Act of 1933.

The only Count of the Indictment naming the petitioner as a defendant was Count I charging conspiracy to violate the Securities Act of 1933 (Title 15, U.S.C. Sec. 77(e), 77(q) and 77(x).

The theory of the Gov't. in its effort to link the petitioner to the conspiracy was a suggestion that the petitioner must have known that American Equities Corporation, the vehicle used in the perpetration of the alleged crime charged in Count I of the Indictment, was not a bona fide corporation and that for the purpose of inducing persons to be defrauded and broker-dealers to purchase, trade and deal in the stock of American Equities Corporation, the defendants named in Count I, Subdivision 4(d) of the Indictment did make and cause to be made untrue statements of material facts concerning the assets and business affairs of American Equities Corporation.

The inferences that the Gov't. apparently was trying to have the Trial Court draw from the evidence, as introduced at the trial, concerning falsity of the facts contained in the pro forma statements prepared by petitioner, Gov'ts. Exhibit 13 and Howard's Exhibit H, was that while the petitioner was not directly shown by competent proof to have had any knowledge as to the true facts concerning the assets and liabilities listed on the statements, he must have been aware that these statements were false and that these statements were being used by the other defendants, particularly Benjamin and Mende, to engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon purchasers of the stock of American Equities Corporation, whom the other defendants and co-conspirators directly or indirectly induced or attempted to induce to purchase said securities.

The proof interposed by the Government as part of its case in its attempt to prove petitioner guilty of the crime charged shows that the petitioner, a Certified Public Ac-

countant, was retained by the defendants, Benjamin and Mende to prepare consolidated balance sheets and statements that were not to be certified unless and until petitioner had an opportunity to examine the books of the companies referred to therein. The petitioner never had such an opportunity for the reason that American Equities Corporation collapsed in the meantime, sometimes in March. The Gov't. witness, Drattell testified that the two pro forma statements prepared by petitioner, Government's Exhibit 13 and defendant, Howard's Exhibit H, were not intended to be accurate or relied on as certified statements and that Drattell knew this as a fact at the time the statements were shown to him by the defendants, Benjamin and Mende (R. 220, 16a). The exhibits spoke for themselves in this respect (R. 331, 332, 16a, 17a). See also testimony of Government witnesses, Reiter, (R. 1529, 79a) and Lane (R. 1069-1077, 34a, 35a). Furthermore, there is not a scintilla of evidence to show any guilty knowledge on the part of Howard in preparing these reports or that he knew that they were to be distributed in furtherance of a scheme to defraud. In the present case using the language of Mr. Justice Cardozo in *People* v. *Galbo*, 218 N.Y. 283, 294, " * * * conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt."

In *U.S.* v. *Crosby, et al.*, 294 F. 2d 928, 942, the Second Circuit reversed convictions for violation of the same section holding that the Government with regard to certain of the appellants failed to prove guilty knowledge and criminal intent stating " * * * The scanty extrinsic evidence produced by the government against these defendants implies guilt only if we first assume guilty knowl-

edge and purpose." The Court of Appeals then went on to hold that such presumption could not be made on the evidence in that case and ordered a reversal. See also *U.S.* v. *Flynn*, 216 F. 2d 354, 360, cert. denied 348 U.S. 909 and *Stone* v. *U.S.*, 113 F. 2d 70, requiring guilty knowledge on the part of a defendant in order to convict, and *Moore* v. *U.S.*, 271 F. 2d 564, *Duke* v. *U.S.*, 233 F. 2d 897 and *Kassin* v. *U.S.*, 87 F. 2d 183, 184, holding that mere suspicion or conjecture cannot take the place of guilty knowledge in a conspiracy case.

POINT II

In any event, on the entire case, a reasonable doubt was created as to guilty knowledge so as to require the Trial Court to acquit the petitioner on the grounds of reasonable doubt.

The Trial Court reserved decision at the close of the Gov't's. case with respect to the motion brought by the petitioner for dismissal of the Indictment for failure to prove a prima facie case (R. 2008, 91a) and on the close of the entire case, denied this motion as renewed on the entire case (R. 2952, 115a). On the defendant's case the petitioner took the stand and testified in his own behalf (R. 2037-2110, 92a-114a) and in addition his grand jury testimony was received in evidence (R. 1414-1490, 35a, 72a) in which petitioner denied in effect any guilty knowledge and wherein he testified to an examination of the books and records of "Captain's Club", an organization whose proposed acquisition by American Equities Mende discussed with the alleged co-conspirator Parks and which Howard, after examining the books and records of that organization, advised against its acquisition "because of

its bad condition" and "they would have to put in $100,000.00 to just break even" (R. 2058, 98a). That certainly does not support the theory of the Gov't that the petitioner knowingly became party to a conspiracy to defraud with regard to securities of a dummy corporation. On the contrary this proof shows good faith on the part of this petitioner and perhaps negligence but no criminal intent. In addition, three character witnesses testified on behalf of petitioner (R. 2029-2034; R. 2035-2036, R. 2089-2096).

It has been held that in order to sustain a conviction not only must the evidence be consistent with guilt but inconsistent with every reasonable hypothesis of innocence. See *McTyre v. U.S.*, 213 F. 2d 65. Certainly in the present case innocence on the part of the petitioner was just as reasonable a hypothesis, if not more so, than guilt.

It is respectfully submitted that, on the whole case, viewing all of the evidence in relation to petitioner, Howard, in the most favorable light to the Gov't, a reasonable doubt as to petitioner's guilt existed and the Trial Court's denial of the petitioner's motion for judgment of acquittal at the end of the whole case ignores the question of reasonable doubt and was such reversible error as to justify the review of the conviction by this Court.

POINT III

The Trial Court committed reversible error in admitting into evidence alleged telephone conversations between the witness, Drattell, and the petitioner, Howard, although no foundation was laid for the admission of these alleged conversations.

The witness Drattell, when testifying on redirect for the Gov't. testified to several telephone conversations allegedly had with the petitioner, Howard (R. 685-693, 18a-22a) concerning the financial statements and the examination of the books and records of the corporations reflected in the pro forma statements as well as concerning the expected certification of the financial statements when and if Howard were able to verify the figures. At no time did Drattell testify to ever meeting Howard and having any conversation with him in person.

The petitioner objected to the admission of these telephone conversations "as improper redirect. No proper foundation laid" (R. 686, 18a). The Court overruled the objection.

At the time the telephone conversations were admitted (R. 688, R. 694, 20a, 22a), the petitioner moved to strike that testimony concerning these telephone conversations on several grounds, among them, "on the ground that there is no identification of the voice". The Court granted that motion "for the time being," stating that "I can't think of any authority which would admit an unidentified voice to be equated with that of a defendant solely by external circumstances having nothing to do with the identification of the voice. That would make it possible for a clever imposter to put an innocent man in jail, it seems to me" (R. 694, 23a).

Subsequently, after the Government's counsel submitted a brief to the Court, the Court changed his ruling and admitted the said telephone conversations into evidence, citing as authority *Van Riper* v. *U.S.*, 13 Fed. 2d 961 (C.C.A. 2d 1926). The petitioner duly excepted to this ruling (R. 699-701, 24a).

It is respectfully submitted that the admission of the aforementioned alleged telephone conversations in evidence was error and that *Van Riper, supra*, is not applicable in this case. It is submitted that the representation by one party to a telephone conversation that he conversed with another, in itself, without voice identification or other independent proof, is not sufficient proof of authentication. See *U.S.* v. *Bucur*, 194 F. 2d 297, 303 (U.S.C.A. 7th 1952).

The case of *U.S.* v. *Washington*, 357 U.S. 348, 2 L. ed. 2d 1368, decided June 23, 1958, reversing 253 F. 2d 913, is a case in point. There the Gov't. introduced an alleged telephone conversation between the defendant and a Mrs. Kernick, which telephone conversation, as testified to by Government agents, was overheard by them. Neither agent, who allegedly overheard the conversation, ever had heard the defendant's voice before but claimed that the voice of the defendant heard by them on the day of the arrest was the same voice they had heard the day before on the telephone. The majority of the Court of Appeals of the 7th Circuit found that that was sufficient identification, holding that from the evidence the trial Judge (the case was tried by a District Court Judge) was justified in finding that the defendant was the person with whom Mrs. Kernick talked on the phone. Chief Judge Duffy dissented, holding that the identification of the voice was not established by evi-

dence that is convincing beyond a reasonable doubt and voted to reverse. The Supreme Court of the United States granted certiorari and reversed the conviction because of the insufficiency of the evidence.

It is respectfully submitted that *U.S. v. Washington, supra*, should be determinative in the instant case, as the witness, Drattell admittedly never met the petitioner and there is nothing in the record to indicate any circumstances that may be of sufficient probative value to identify the petitioner, as the voice, which answered Drattell's telephone call. The admission of these telephone conversations was clearly prejudicial to the petitioner and warrants a review of the judgments for that reason alone as the Courts below relied heavily on that testimony in sustaining the conviction of the petitioner.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its power should order the judgment of conviction of the petitioner reversed and direct the dismissal of the indictment or order a new trial for the petitioner.

Respectfully submitted,

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Member of the Bar of the
Supreme Court of the United States,
Attorney for Petitioner

Of Counsel:

ALLEN S. STIM,
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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 192—September Term, 1963.

(Argued December 4, 1963 Decided February 17, 1964.)

Docket No. 28404

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARTIN BENJAMIN, BERNARD HOWARD and MILTON Z. MENDE,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal by three defendants, Mende, Benjamin and Howard, from a judgment of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, convicting them of conspiracy to sell unregistered securities and to defraud, in violation of 15 U. S. C. §§77e(a) and

(c), q(a), and x, and, in the cases of Benjamin and Mende; on three substantive counts for using the mails to defraud, 18 U. S. C. §1341. Affirmed.

MENAHEM STIM (Curran, Mahoney, Felix & Stim, New York, N. Y.) (Allen S. Stim, John F. Kelly, of Counsel), *for appellant Bernard Howard.*

ARTHUR ADDESS (Bobick & Deutsch, New York, N. Y.), *for appellant Milton Z. Mende.*

IRWIN L. GERMAISE, New York, N. Y., *for appellant Martin Benjamin.*

NEAL J. HURWITZ (Robert M. Morgenthau, United States Attorney for the Southern District of New York, John S. Martin, Jr., Assistant United States Attorney, of Counsel), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

This appeal concerns another of those sickening financial frauds which so sadly memorialize the rapacity of the perpetrators and the gullibility, and perhaps also the cupidity, of the victims. It is unusual in that the vehicle, American Equities Corporation, owned nothing at all—and, in a happier sense, in that the SEC was able to nip the fraud quite early in the bud. The appellants are Milton Mende, the principal promoter, Martin Benjamin, his lawyer, and

Bernard Howard, a certified public accountant. After trial in the District Court for the Southern District of New York before Judge Palmieri without a jury, all three were convicted of conspiring willfully by use of interstate commerce to sell unregistered securities and to defraud in the sale of securities, in violation of the Securities Act of 1933, §§5(a) and (c), and 17(a), 15 U. S. C. §§77e(a) and (c), and q(a), sections which are implemented criminally by §24 of the Act, 15 U. S. C. §77x. Mende and Benjamin were convicted also on three substantive counts for using the mails in furtherance of the fraudulent schemes in violation of 18 U. S. C. §§1341. As their sentences on the latter counts were the same as those on the conspiracy count and run concurrently with them, and as we are satisfied that their conspiracy conviction was proper, we need not concern ourselves with the mail fraud counts. *Lawn* v. *United States*, 355 U. S. 339, 362 (1958).

Since the principal claim of Howard and Benjamin relates to the sufficiency of the evidence against them, it is necessary to give some description of what went on. The scheme began in December, 1960, when Mende, then in Nevada, arranged to be put in touch with a Reno attorney, McDonald, who was reported to have some "old corporations prior to 1933" for sale. Mende's interest in corporations of such vintage was due to §3(a)(1) of the Securities Act of 1933, 15 U. S. C. §77c(a)(1), which confers an exemption from the need for registration on

> "Any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by

> the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days."

He was especially attracted by a 1919 shell, then bearing the rather appropriate name of Star Midas Mining Co., Inc. Authorized to issue 1,500,000 shares with a par value of 10¢ per share, Star Midas had approximately 964,000 shares outstanding, nearly all owned by a so-called "Mahoney group." It had no assets. After arranging to purchase the Mahoney holdings for $5,000 plus a $1,500 fee, Mende instructed McDonald to change the corporate name to American Equities Corporation and to increase the authorized capital to $1,500,000 by raising the par value to $1 per share. Before closing the purchase, the funds for which were not yet available, Mende, with McDonald's cooperation, bought stock certificates and a seal reflecting these changes. The purchase was not completed until February 23, 1961, when McDonald, having previously caused appropriate resolutions to be adopted and new officers and directors of Mende's selection to be named, turned over to Reiss and Kovaleski, as Mende's representatives, the books and records of the corporation and stock certificates for the 890,000 shares owned by the selling group. At this time the name of the corporation was changed.

Mende had not waited to acquire the American Equities shares before starting to sell them. In mid-January, 1961, he ordered an additional supply of stock certificates from a Los Angeles printer. By entering a bid to buy shares he

arranged for American Equities to appear in the pink and white sheets of the National Quotation Service at a price of something over $5 per share. Robert Drattell, president of Lawrence Securities, Inc., which was inactive because of financial difficulties, testified that Benjamin then sought to interest him in selling shares of a corporation whose alleged assets corresponded with those later shown in statements of American Equities. Benjamin indicated that if Drattell would cooperate, he might be in a position to find some way to make capital available to Lawrence Securities. Later in January, Benjamin had Drattell come to a New York hotel to meet Mende, who told Drattell and Reiter, another broker, in Benjamin's presence, that American Equities "was a holding corporation that had property, various types of property all over the United States, assets of about six and a half million dollars, liabilities of about three million dollars." Mende whetted Drattell's appetite, as Benjamin had already done, by indicating he would help to get Lawrence Securities back on its feet. Drattell said he "would need letters of opinion" and "certified financial statements," and also would need to see the transfer records which, Mende told him, were kept by "a certified public accountant out on the Coast."

Benjamin speedily filled one of Drattell's demands by handing him a signed opinion, dated January 28, 1961, headed "To Whom It May Concern: American Equities Corporation." It recited that the corporation was organized in May, 1919, "and there was at that time issued to the public, 963,067 Shares." It went on to say that in

Benjamin's opinion "the aforesaid shares are presently free and tradeable pursuant to" §3(a)(1) of the Securities Act which it quoted, and reiterated:

> "In view of the foregoing section, and further in view of the fact that the original issuance of the 963,067 Shares in May of 1919, falls directly within Section 3(1) of the Securities Act of 1933, and is therefore, in my opinion, free and tradeable." [sic]

On January 28, Benjamin with Reiter and another broker, Parks, went to Los Angeles. Mende gave 4,000 shares of American Equities to Parks and 20,000 shares to Reiter, and also handed Reiter 5,000 shares to be given to Drattell. The latter used these to obtain from the Empire Trust Company a $12,500 loan, $3,500 of which went to bolstering Lawrence Securities' depleted capital account and the balance to Reiter, Mende and Mende's wife; Drattell sent a confirmation, dated January 31, 1961, of the "purchase" of these 5,000 shares for $9,000 to "Martin Benjamin Trustee." Later, after Drattell had gone to California to view some of the supposed assets of American Equities, he and Benjamin visited the office of Reiss, the transfer agent, where Benjamin prepared two letters. One, signed by Reiss, advised as to the 5,000 shares given to Drattell "that said certificates is free stock and is not investment stock";[1] the second, dated back to January 31, and signed by "Martin Benjamin Trustee," purported to evidence the "sale" of the 5,000 shares for $9,000 and di-

[1] By what Dratell assumed to have been a Freudian slip, the word "not" was originally typed "hot."

rected the distribution to Reiter and Mrs. Mende that had already been made.

Reiter and Parks had also brought from California copies of a paper with a printed cover entitled "American Equities Corporation." This contained an unidentified "Pro Forma Balance Sheet" as of November 30, 1960, in fact prepared by Reiss,[2] and a sheet of descriptive material, a draft of which the judge could reasonably have found to have been written out by Benjamin. The first numbered paragraph of this recited that American Equities was "a diversified investment company formed in the State of Nevada in 1919" and that its holdings consisted of "8 Apartment Houses, 2 Hotels, 2 Office Buildings (all located in Detroit area, Michigan)" with a "gross income from the properties" of $1,061,406.51 and net income of $200,000. This was completely false; the company owned no real estate in Detroit or elsewhere. Three subsequent paragraphs gave facts and figures as to the Outpost Inn, in Arizona, Biesmeyer Boat & Plastic Co., also of Arizona, and Stanford Trailer and Marine Supply Co., of California; the description did not say just what was American Equities' interest in these companies and the only elucidation in the balance sheet was in a note indicating that the price of the Outpost Inn would be $71,000 in cash and a $79,000 note, the former being separately shown as a liability. In fact, no arrangements of any kind had been made as to the Outpost Inn, and the owner of Biesmeyer testified

[2] Reiss was also convicted of conspiracy but has not prosecuted an appeal.

that in December, 1960, he had agreed to give Mende an option for a down payment of $10,000 which was never made; we are not informed as to Stanford Trailer and Marine. Finally the description stated that American Equities "has acquired a working interest of 68% of the California Molded Products," whose 1961 sales were estimated at $2,000,000 with a gross profit margin "in excess of 30.1% with a potential of 32% by April, 1961," and that American Equities was negotiating to acquire still other companies, one "doing in excess of $20,000,000.00 annually." In fact, and to Benjamin's knowledge, American Equities had not acquired any interest in California Molded Products; all it had was a month's option, dated January 16, 1961, to acquire 68% of the stock for $145,000.

In mid-January, Benjamin invited Howard, a certified public accountant who had served Benjamin and his clients, to do some work for American Equities. Howard testified he received the November 30, 1960, "Pro Forma Balance Sheet," a yellow handwritten sheet of paper listing certain real estate holdings in Detroit, and balance sheets of corporations which Mende and Benjamin claimed were "owned or controlled" by American Equities. From these materials and without any examination of books and records, he prepared a paper dated February 10, 1961, and on the following day gave copies of this to Mende who handed one to Reiter. The latter testified that this was in Howard's presence.

The paper has a cover, on the stationery of Howard as a Certified Public Accountant, which bears the legend:

AMERICAN EQUITIES CORPORATION

DECEMBER 31, 1960

AUDITORS REPORT

This is followed by a two-page letter in which Howard advises the company that "After an examination of the books and records of the diversified holdings of your corporation for the period ended December 31, 1960," he is submitting a report of the company as at that date, consisting of "Exhibit 'A'—Pro-forma Balance Sheet as at December 31, 1960." Next comes a section entitled "COMMENTS" informing the company that it is "a diversified investment corporation with the following holdings." These were substantially the same as in the description accompanying the November 30 statement, with the Outpost Inn, Biesmeyer, Stanford and also California Molded Products now clearly listed among them. The comment on California Molded Products anticipates 1961 sales of $2,000,000 with gross profit margin in excess of 30% and a net of better than 4%, but omits to limit the company's interest in these riches to 68%, the most that was claimed by the November 30 balance sheet. The comments say that "The statement which is pro-forma includes the disposition of $500,000 which a group of stockholders propose to advance to the corporation as a long term loan"; that $150,000 of this was to be advanced to subsidiaries for working capital and $71,000 "to repay an officer for the purchase of the assets of the Outpost Inn, Inc."; that "The assets are shown at actual cost and are calculated at the most conservative

value," although "A recent appraisal of the real estate in Detroit shows an increase of approximately $2,500,000.00 over book value, which has not been reflected in the statement"; that "The accounts receivable, loans receivable, loans payable, and mortgages payable were not verified by direct communication" and inventories were taken as submitted by the management; and, finally, that "The statement reflects an accurate and true picture of the corporation's net worth after taking into consideration the proposed loan by the officers." The "Pro-Forma Balance Sheet as at December 31, 1960" showed total assets of $7,769,657.11 and a net worth of $3,681,049.70—this including $963,067.00 in the capital stock account. Howard received $200 for his two days of service in preparing the report.

During February, Mende asked Howard to investigate a possible acquisition, on which Howard made a negative recommendation, and Howard discussed the statements of Plametron Corporation with its owner, Frankl, who had previously offered a half interest for $150,000 and was desirious of selling to Mende. In Howard's presence Mende gave Frankl a copy of Howard's December 31 Auditor's Report. There was evidence also that Drattell, whom Howard knew to be a broker interested in American Equities stock, telephoned him to discuss this report. Toward the end of February Mende asked Howard to come out to California; Mende's promise of a $200 advance remained unfulfilled despite Howard's repeated requests but Mende gave him a one-way air ticket. He stayed with Benjamin from February 27 to March 7 at the Beverly Hilton Hotel,

which cut off food and telephone service for non-payment of bills and threatened to hold his baggage on departure. While in California, he made some examination of the books and records of California Molded Products, without investigating whether American Equities in fact owned 68% of the stock, and also of J. S. Lane & Co. which Mende said he was interested in buying for American Equities. Howard was given a copy of a statement, dated August 31, 1958, of Verdi Development Corporation; Kovaleski told him this was a dormant corporation which had been through a Chapter X proceeding and whose principal asset, a uranium mill, had been sold in foreclosure.

Under date of March 6, 1961, after the cut-off of food and telephone service, Howard rendered a second "Auditor's Report," which he left with Benjamin. This purportedly reflected "an examination of the books and records of the diversified holdings of your corporation for the period ended January 31, 1961." Although generally similar to his previous "Auditor's Report," it differed in some significant respects: Biesmeyer Boat and Plastic Co. and Stanford Trailer and Marine Supply Co. were no longer included; as Howard was later to tell the grand jury, the two boat companies "went down the river." Nevertheless the list grew from five to six through three additions. Plametron Corporation was included, without any investigation of its acquisition on Howard's part despite the personal knowledge he had gained. So also was J. S. Lane & Co.; Mende and Benjamin had been negotiating for the purchase of this company for $1,100,000 as Howard well

knew since only a few days previously he had examined its books "to determine if the price they were offering was adequate . . ." As seems generally to have been the case, Howard's pro-forma report apparently makes no provision as to the acquisition cost. The comments also note the inclusion in the balance sheet of "Verdi Development Company . . . a mining company with various mills and claims in California, Utah and Nevada"; despite the age of Verdi's financial statement and what Kovaleski had told him, Howard reported as an asset "Unrecovered Development Costs of $707,554.21, this being a major factor in the remarkable increase in American Equities net worth from $3,681,049.70 to $4,609,560.07 in a single month. In addition to the $2,500,000 increment in the Detroit real estate from an appraisal previously reported, there is now an added $500,000 increase in the value of equipment. Nowhere was it suggested, unless by the naked word "pro-forma, that American Equities acquisition of the mentioned companies had not yet been accomplished. To the contrary, a new paragraph recited:

> "A consolidated statement of income and profit and loss for the six months ended January 31, 1961 shows a net profit $399,623.94 on the basis of the last six months operations of the six corporations involved although they were all only recently acquired within the last few months. However, on the basis of a yearly projection of the six profits the corporation shows a net earnings of approximately 80¢ a share. With the contemplated expansion program under way, this should be increased.

This was supported by an exhibit entitled

> American Equities Corporation
> Consolidated Statement of Income and Profit and Loss for the Six Months Ended January 31, 1961.

American Equities stock continued to be sold until March 22, 1961, when, as a result of the SEC's action, trading stopped.

Howard's principal claim is that the evidence against him was insufficient to show the state of mind required for a criminal conviction. He says he was performing an accountant's duties innocently if inefficiently—and for a negligible compensation, that he sheltered himself with the label "pro forma," and that he did not know his reports were to help in stock peddling but thought they were to be used solely for management purposes. His own testimony belies the last claim; he admitted knowing that the promoters intended to use the stock as collateral for loans or as part of or collateral for the purchase price in various acquisitions and that his statements were shown to prospective lenders or sellers. Since his reports were little more than a regurgitation of material handed him by the "management" and related to properties that, as he had reason to know, were not owned, the judge could properly have regarded his claim that he thought them needed for "management" purposes as incredible in the last degree. But the evidence we have summarized shows directly that he knew his reports were being used with brokers who were selling the stock. Drattell, whom he knew to be a broker

interested in American Equities, telephoned him in regard to his reports,* and, on Reiter's testimony, he saw Mende hand a copy of his first report to Reiter whom he knew to be similarly interested.

The argument that reports which depicted American Equities as owner of properties and companies it neither owned nor had any firm arrangements to acquire were not false because they were stated to be "pro forma" involves a complete misconception of the duties of an accountant in issuing a report thus entitled. Although pro forma state-

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* Howard objected to the admission of this evidence on the ground that Drattell, who had not previously met him, could not identify his voice. It is true that the mere announcement of identity *by a person who has placed a telephone call* does not suffice to make it admissible against the person so identified. See 7 Wigmore, Evidence 617 (3d ed. 1940), and *United States* v. *Ross*, 321 F. 2d 61, 69 (2 Cir.), cert. denied, 375 U.S. 894 (1963). But Wigmore rightly differentiates the case "of B's *first calling up* A and being *answered by a person purporting to be A*." In *Van Riper* v. *United States*, 13 F. 2d 961, 968 (2 Cir.); cert. denied sub nom. *Ackerson* v. *United States*, 273 U.S. 702 (1926), Judge Learned Hand approved decisions "that when a witness calls up at the proper number in a telephone book the person whose admissions are relevant, and gets an answer from one professing to be the person called, it is prima facie proof of identity." See also *United States* v. *Rosenberg*, 195 F. 2d 583, 597 (2 Cir.), cert. denied, 344 U.S. 838, rehearing denied, 344 U.S. 889 (1952); *United States* v. *Bucur*, 194 F. 2d 297, 303-304 (7 Cir. 1952). The evidence here went far beyond what Judge Hand thought should suffice as "prima facie proof of identity." Drattell called the number given in Howard's December, 1960, report, was answered by a man identifying himself as "Bernard Howard," discussed the report with the answering voice, was given another number which Howard admits to be his, called that number, was answered by the same voice which again discussed American Equities, and was later called by the same voice for a further discussion. To say that all this did not establish Howard's identity sufficiently to make the conversation admissible would outrage common sense.

ments "purport to give effect to transactions actually consummated or expected to be consummated at a date subsequent to that of the date of the statements," "auditors consider it proper to submit their report and opinion on such statements only when the nature of the transactions effected is clearly described in the statements, and when satisfactory evidence of their bona fides is available, such as actual subsequent consummation or signed firm contracts." Montgomery, Auditing Theory and Practice (6th ed. 1940), 62-63; see also Prentice-Hall Encyclopedic Dictionary of Business Finance (1960), 485. It would be insulting an honorable profession to suppose that a certified public accountant may take the representations of a corporation official as to companies it proposes to acquire, combine their balance sheets without any investigation as to the arrangements for their acquisition or suitable provision reflecting payment of the purchase price, and justify the meaningless result simply by an appliqué of two Latin words.

It is true that the Government had not merely to show that the statements were false but to present evidence from which the judge could be convinced beyond reasonable doubt of Howard's culpable state of mind. But, as Judge Hough said for this court years ago, "when that state of mind is a knowledge of false statements, while there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situation and continuity of conduct an inference that he *did* know the untruth of what he said or wrote may legitimately

be drawn.'" *Bentel* v. *United States*, 13 F. 2d 327, 329 (2 Cir.) cert. denied sub nom., *Amos* v. *United States*, 273 U. S. 713 (1926). Any accountant must know that his obligations in certifying "pro forma" statements are not satisfied by any such arithmetical exercise as Howard performed. But, as our description of the reports has indicated, there were further false assertions, some of them clearly known to Howard to be such; these constituted a basis for holding him that was independent of the falsity of the total report, as well as for discrediting his assertions of ignorance as to what was required of him. The Michigan real estate was represented to Howard not as properties to be acquired but as already owned; he claimed to have seen deeds for these properties but admitted that American Equities was not named as grantee. The statements that certain assets had not been "verified by direct communication" implied that with this qualification all assets had been verified by suitable means; they had not been. Howard made no examination of American Equities' books, which, indeed, were not available when he rendered his first report; even a most cursory inspection would have revealed that nothing had been paid when the capital stock account was written up ten-fold. His statement purported to reflect "an accurate and true picture of the corporation's net worth after taking into consideration the proposed loan by the officers"; at best it would have been accurate only if the corporation had had at least some contractual basis for the assertion of ownership, and even then only if proper provision had been made for the cost. The inclusion as an

asset of over $700,000 of "Unrecovered Development Costs" of a dormant mining company known to have been through insolvency proceedings was wholly indefensible. Perhaps most damning of all was the making of a profit and loss statement including a positive assertion that the six companies were "acquired within the last few months," when Howard knew that at least some of them had not been acquired at all.

These and other items we could mention—and this in a setting where, at the very time that Howard was delivering his second report extolling the prospects of this $8,700,000 company, he had been unable to obtain a $200 advance and the hotel had turned off food and telephone service for non-payment of bills—were quite sufficient to convince a trier of the facts beyond a reasonable doubt that Howard had actual knowledge of the falsity of his reports and deliberately conspired to defraud investors. As Judge Learned Hand said in a similar context, ". . . the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." *United States* v. *White*, 124 F. 2d 181, 185 (2 Cir. 1941).

In fact, however, the Government was not required to go that far. "Willful," the Supreme Court has told us, "is a word of many meanings, its construction often being influenced by its context." *Spies* v. *United States*, 317 U. S. 492, 497 (1943), citing *United States* v. *Murdock*, 290 U. S. 389, 394-96 (1933). We think that in the context of §24 of the Securities Act as applied to §17(a), the Government

can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see, compare *United States* v. *Spurr*, 174 U. S. 728 (1898) and American Law Institute, Model Penal Code, §2.02(7), commentary in Tent. Draft No. 4, pages 129-30 (1955), or recklessly stated as facts things of which he was ignorant. Judge Hough so ruled in *Bentel* v. *United States*, *supra*; although that case and the similar ruling in *Slakoff* v. *United States*, 8 F. 2d 9 (3 Cir. 1925), were under the mail fraud statute, 215 of the then Criminal Code, 35 Stat. 1130 (1909), the ancestor of 18 U. S. C. §1341, which does not use the term "wilfully," the Congress that passed the Securities Act scarcely meant to make life easier for defrauders. Other circuits have gone further and have held the willfulness requirement of the Securities Act to be satisfied in fraud cases by proof of representations which due diligence would have shown to be untrue. *Stone* v. *United States*, 113 F. 2d 70, 75 (6 Cir. 1940); *United States* v. *Schaefer*, 299 F. 2d 625, 629, 632 (7 Cir.), cert. denied, 370 U. S. 917 (1962). In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crow-bar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability simply because more skillful practitioners would not have made them. But Congress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance

when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess. Compare *Brown* v. *Bullock*, 294 F. 2d 415, 420 (2 Cir. 1961), as to the meaning of willful conversion in §37 of the Investment Company Act, 15 U. S. C. §80a-36.

Much of what we have said as to Howard is relevant also to Benjamin's claim of insufficiency of the evidence as to his culpable state of mind. Benjamin brought Howard into the scheme; he had written out the list of assets which Howard later used in his first report; as Howard testified, Benjamin had told him to take the statements of the various companies "and just put them into a consolidated form"; and his work in connection with several of the proposed "acquisitions" gave him actual knowledge of the falsity both of the November 30 statement and of Howard's reports. But there was much more than this. His opinion letter made a positive statement that he believed all the shares of American Equities were exempt from registration, although he must have known that control of the corporation, not yet even named "American Equities Corporation," was being acquired by Mende and that the statute explicitly denied exemption to any new offerings by persons in control, a limitation of which his testimony before the SEC showed he was well aware. Yet there is abundant evidence that Benjamin knew Mende was putting American Equities shares on the market. Among the instances was the transaction outlined above with Drattell in late January wherein Benjamin received a confirmation of a purchase of 5,000 shares from "Martin Benjamin

Trustee" for $9,000—at a time when the pink sheets were quoting the stock at $5 per share or more—and the distribution of part of the proceeds to Mende and his wife; yet Benjamin prepared a letter whereby the transfer agent certified these shares to be "free stock and . . . not investment stock." In another transaction, not previously mentioned, wherein Mende had a nominee, Mrs. Tanner, sell American Equities shares to relatives and friends of Paul Reicher, her father, on a basis whereby she retained $2 per share for her pains, she received a letter signed by "Martin Benjamin Trustee" acknowledging the sale of 11,000 shares to her and the receipt of $4.75 per share. Benjamin's role was far more than that of an attorney. He told Drattell he was acting as a "trustee" for some of the principals and, when Drattell sought elucidation, explained that "as a trustee and as an attorney . . . licensed in the State of New York, . . . he was not obligated to reveal any of the sources and it is enough for anyone to accept a legal document from a trustee who was an attorney and the trustee was not required to reveal the source of the legal document or who the principals were behind the legal document"—surely a novel contribution to the law of trusts. His proffer of financial aid if Drattell would undertake some distribution of American Equities afforded further basis for inferring knowledge of the intended fraud, as did his efforts falsely to minimize Mende's role when he and others were examined by the SEC. This and other evidence made a case at least as strong as that held sufficient with respect to another lawyer in *United States* v. *Crosby*, 294 F. 2d 928, 938.

(2 Cir. 1961), cert. denied sub nom. *Mittelman* v. *United States*, 368 U. S. 984 (1962).

Howard and Benjamin make the complaint, standard in appeals of this sort and buttressed by the inevitable citation of *Kotteakos* v. *United States*, 328 U. S. 750 (1946), that although the indictment alleged a single conspiracy, the proof showed separate ones to sell unregistered securities and to defraud. The argument could not avail Benjamin in any event since the evidence clearly implicated him in both aspects of the scheme. See *United States* v. *Agueci*, 310 F. 2d 817, 827-28 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963). But the point is wholly without merit. The fraudulent acts and the unlawful failure to register information which would uncover them were essential steps in a single scheme to dupe; the limited scope of *Kotteakos* was explained in *Blumenthal* v. *United States*, 332 U. S. 539, 558-59 (1947) and its inapplicability to an integrated financial fraud like this was affirmed by us in *United States* v. *Crosby*, *supra*, 294 F. 2d at 944-45. It is thus immaterial that the evidence may not have shown awareness by Howard of the part of the scheme that involved the sale of unregistered shares, *United States* v. *Agueci*, *supra*, and cases there cited.

Mende, as the central figure in the scheme, has not challenged the sufficiency of the evidence introduced against him. He raises several points on appeal; all seem so patently without substance as not to require discussion. We here mention only his claim that McDonald's testimony should have been excluded under the attorney-client privi-

lege, and we do that solely to state its complete lack of merit. The relation between Mende and McDonald was not that of client and attorney but of buyer and seller; what Mende was seeking from McDonald was not legal advice but a pre-1933 corporate shell.

Affirmed.